

[illegible]

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) The amount of compensation due.

- (3) The parties initially raised the issue of unauthorized medical in the amount of \$350.00. At oral argument before the Appeals Board both claimant and respondent agreed that claimant was entitled to up to \$350.00 in unauthorized medical expense upon presentation of an itemized statement verifying same. As such, this issue will not be considered by the Appeals Board having been rendered moot by the parties' stipulation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered significant physical injury on October 14, 1991, when he fell backwards off of concrete forms and was impaled on a metal stake sticking out of the ground. The stake damaged claimant's rectum, colon, bladder and right ureter. Claimant was taken to the hospital where emergency surgery was performed and, in order to allow claimant's colon and ureter to heal, he was temporarily fitted with a colostomy and a ureteral stint. In January 1992, both the colostomy and the stint were removed and the colon and ureter resumed normal function.

However, in December 1991, claimant began experiencing a debilitating overall weakness or fatigue and a shortness of breath. Claimant has had numerous medical workups and diagnostic procedures in order to diagnose the cause of the symptoms of fatigue and shortness of breath, none of which were successful in properly diagnosing claimant's condition. The conditions of weakness and shortness of breath have severely limited claimant's physical activities.

The medical opinions of Dr. Bernard Abrams and Dr. P. Brent Koprivica were considered by the Appeals Board in this matter. Dr. Abrams, a neurologist, performed a neurological examination upon claimant in order to diagnose the basis for his symptoms. Dr. Abrams was unable to identify what was wrong with claimant but could say with no hesitation that claimant's accident did not cause the symptoms experienced by the claimant. Dr. Abrams felt it significant that claimant's upper extremity symptomatology did not become severe until a 1995 nail-pulling incident when claimant had an onset of pain in his neck and upper extremities. He did state that claimant was suffering from some underlying disease not yet diagnosed which was in no way related to claimant's work related injury.

Claimant was examined by Dr. P. Brent Koprivica who opined the claimant has suffered a 28 percent functional impairment as a result of a physical injury suffered when he fell on the steel stake. Dr. Koprivica also attempted to diagnose the cause of claimant's ongoing physical limitations but could provide no physical diagnosis. He did opine that claimant's condition was more likely than not post traumatic but could not be specific in diagnosing the specific cause of claimant's weakness, numbness and shortness of breath.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines the burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The decision regarding whether claimant's ongoing symptomatology stems from his October 14, 1991, injury can only be made based upon competent medical evidence. With two medical opinions in evidence it becomes the decision by the trier of facts to decide the accuracy and the credibility of the medical testimony along with the other evidence in the file. The trier of facts is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev denied 249 Kan. 778 (1991).

The two medical opinions in this record are somewhat divergent. Dr. Abrams states emphatically claimant's ongoing difficulties do not stem from the injury suffered by claimant in 1991 while working with respondent. Dr. Koprivica's opinion on the other hand is not so absolute. He clearly defines claimant's condition to be a physically debilitating condition but can only state that it is more likely post traumatic. He can provide no specific diagnosis and no medical support for his opinion. The Appeals Board therefore finds that, based upon the opinion of Dr. Abrams, claimant has failed to prove by a preponderance of the credible evidence that his ongoing debilitating symptoms stem from the injury of October 21, 1991.

It was stipulated, however, that claimant suffered accidental injury arising out of his employment. Dr. Koprivica found claimant to have suffered a 28 percent permanent partial functional impairment to the body as a whole as a result of these injuries.

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence . . . ". See K.S.A. 44-510e as amended.

The Appeals Board finds the opinion of Dr. Koprivica, in establishing claimant's functional impairment, to be competent medical evidence. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board finds, as a result of the injury suffered on October 14, 1991, claimant has proven that he suffered a 28 percent permanent partial functional impairment

to the body as a whole. Claimant is granted an award against the respondent and its insurance company in said amount.

**AWARD**

**WHEREFORE** it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated March 20, 1996, should be, and is hereby, modified and claimant, Bill Bailey, is granted an award against the respondent, Harbin Construction Company, and its insurance carrier, Continental Insurance Company, for a 28 percent permanent partial functional impairment to the body as a whole as a result of injuries suffered on October 14, 1991.

Claimant is entitled to 97 weeks temporary total disability compensation at the rate of \$200.01 a week totaling \$19,400.97 followed by 318 weeks permanent partial general body disability compensation at the rate of \$56.00 per week in the amount of \$17,808.00, based upon an average weekly wage of \$300.00, for a 28 percent permanent partial whole body functional impairment for a total award of \$37,208.97.

As of August 9, 1996, there will be due to claimant 97 weeks temporary total disability compensation at the rate of \$200.01 per week in the sum of \$19,400.97 followed thereafter by 154.57 weeks permanent partial general body disability compensation at the rate of \$56.00 per week in the amount of \$8,655.92 for a total due and owing of \$28,056.89 which is ordered paid in one lump sum minus amounts previously paid. Thereafter claimant will be entitled to 163.43 weeks permanent partial disability compensation at the rate of \$56.00 per week in the amount of \$9,152.08 until fully paid or until further order of the Director.

The medical expenses awarded in the Award of Administrative Law Judge Bruce E. Moore of March 20, 1996, are affirmed by the Appeals Board.

Claimant is further entitled to up to \$350.00 unauthorized medical upon presentation of an itemized statement verifying the same.

Future medical will be considered upon proper application to and approval by the Director.

The claimant's attorney fee contract is approved insofar as it is in agreement with K.S.A. 1991 Supp. 44-536.

The fees necessary to defray the expense of the administration of the workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

OWENS, BRAKE, COWAN & ASSOCIATES	
Regular Hearing Transcript	\$ 250.10
Dated November 16, 1995	
REBECCA J. RAMSAY, RPR	
Deposition of Dr. P. Brent Koprivica	\$ 291.20

**BILL BAILEY**

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**DOCKET NO. 189,656**

Dated December 4, 1995

Deposition of Dr. Bernard Abrams  
Dated December 4, 1995

\$ 145.00

Deposition of Dick Santner  
Dated December 27, 1995

\$ 225.10

Total \$ 661.30

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1996.

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**BOARD MEMBER**

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**c:** James E. Martin, Overland Park, KS  
Jeffrey E. King, Salina, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director